(4)

NO. 91-1444

Supreme Court, U.S.
FILED
APR 20 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1991

WILLIAM UTESCH, MICK DREA,
VICTOR C. TOMKA, CLARENCE VOS, *ET AL.*,
Petitioners,

v.

THOMAS H. DITTMER AND REFCO, INC.,
Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION

DAVID H. WEINSTEIN*
ROBERT S. KITCHENOFF
Kohn, Nast & Graf, P.C.
1101 Market Street, Suite 2400
Philadelphia, PA 19107
(215) 238-1700

Attorneys for Petitioners Utesch, *et al.*

*Counsel of Record

THE COPY CENTER, INC. 615 Chestnut Street Philadelphia, PA 19106 215-928-1900

TABLE OF CONTENTS

Page

Table of Authorities. ii

REPLY TO RESPONDENTS' STATEMENT OF THE CASE. 1

REPLY REASONS FOR GRANTING THE WRIT. 3

1. Respondents' Argument Demonstrates that the Court Below Actually Reweighed the Evidence, in Violation of the Seventh Amendment. 3

2. The Decision Below Improperly Restricts Recovery under the Commodity Exchange Act. 5

3. Conspiracy of a Corporation with its President who is Pursuing his Private Interests is an Important Issue the Court should Review. 6

CONCLUSION. 7

TABLE OF AUTHORITIES

Cases — Page

Dandridge v. Williams, 397 U.S. 471 (1970). 5

Leist v. Simplot, 638 F.2d 283 (2d Cir. 1980), *aff'd sub nom. Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353 (1982). 5

United States v. Colgate & Co., 250 U.S. 300 (1919). 6

Utesch v. Dittmer, 947 F.2d 321 (8th Cir. 1991). 4

Constitution, Statutes, and Rules

U.S. Const. Amend. VII. 3

Commodity Exchange Act, 7 U.S.C. § 1 et seq. 5, 6

Supreme Court Rule 15.6. 1

Pursuant to Rule 15.6 of the Court, Petitioners[1] hereby reply to certain matters set forth in Respondents' Brief in Opposition.[2]

REPLY TO RESPONDENTS' STATEMENT OF THE CASE

Respondents accuse plaintiffs of "misleading" the Court. Resp. Br. at 1, 2 n.1. The Respondents' cited example of allegedly misleading recitation of the record is anything but that. It matters not what name Dittmer had on his account (i.e. "speculative" or "hedge"), he made huge profits in his October and other live cattle futures trading during October 1979. Respondents carefully avoid saying otherwise, except to refer to them as "proceeds not profits." *Id.*

Actually, it is Respondents' Brief that is misleading. They falsely state that plaintiffs' "transcript reference (Tr. 1454) . . . does not support [their] assertion," and then Respondents quote a portion of the trial transcript. Resp. Br. at 2. This approach is misleading and irresponsible, because throughout the Petition plaintiffs carefully cited the lines of testimony, not merely the pages, upon which plaintiffs relied. The portion quoted by Respondents and attributed to

---

1. Terms defined in the Petition for Writ of Certiorari (the "Petition") are used with the same meanings in this Reply Brief in Support of the Petition.

2. Respondents' Brief in Opposition is hereafter referred to as "Respondents' Brief" and cited as "Resp. Br."

plaintiffs is **not** part of the transcript they cited in the Petition.[3]

Respondents' recitation of a litany of findings supposedly made by the court of appeals, Resp. Br. at 3-4, is equally unreliable and misleading. It is telling that Respondents carefully avoided citation to the opinion below for any of the six supposed appellate findings.

Again, disregarding plaintiffs' theory of the case[4] that what was significant was the combined effect of Dittmer's and Refco's deliveries in early October, Respondents focus solely upon Dittmer's personal trades and announce that plaintiffs' expert found them to be "insignificant." Resp. Br. at 3, 6. What Respondents omit, but what the jury below heard, was that Dr. Beyer repeatedly stated that one or another portion of Dittmer's trading, when examined in a vacuum, would have limited impact "in and of itself." Tr. 1510:9, 20, 25. The same expert, however, testified that someone with the amount of trades that Dittmer and Refco combined demonstrated[5] could influence or have an impact

---

3. In the Petition, at 14, Plaintiffs cited lines 9-13 and 18-24 of transcript page 1454, whereas Respondents quoted (and falsely attributed to Plaintiffs' citation) lines 16-17 and even then took the quotation out of context.

4. Respondents falsely and without citation accuse plaintiffs of repeatedly changing theories. This is just not so. Resp. Br. at 5.

5. The opinion was premised, *inter alia*, upon a trader in October 1979 live cattle futures who, like Dittmer, was president and CEO of a major commodities futures brokerage firm; had taken a consistent public position advising others to take long positions (continued...)

upon the futures price, causing it to change. Tr. 1468:7-9; 1467:2-6. In essence, Respondents implicitly ask the Court (as they did the appellate court) to re-weigh the evidence, even as they eschew that approach.

REPLY REASONS FOR GRANTING THE WRIT

1. Respondents' Argument Demonstrates that the Court Below Actually Reweighed the Evidence, in Violation of the Seventh Amendment.

Despite their attempts to argue otherwise, Respondents concede the essential facts upon which the plaintiffs' seventh amendment claim is based. Respondents also assidiously avoid discussing the import of the evidence discussed in the Petition (e.g., at 17-19, 12-15).

Plaintiffs asserted (Petition at 18) that the Eighth Circuit "chose not to believe the evidence of the falsity of Dittmer's pre-October exhortations about the futures market." In response, Respondents merely argue that the Eighth Circuit found the testimony of two eyewitnesses, Apel and Johnson, "was insufficient to establish falsity" in light of inferences to be drawn from evidence of some of Dittmer's trading and from some unexplicated "realities of trading in the futures market." Resp. Br. at 6. In other words, Respondents concede that the appellate court substituted its

---

5.(...continued)

in cattle futures; had delivered 77 of the 166 contracts delivered on the first trading day in October, while he and his brokerage together accounted for 96 (or over 55%) of the day's deliveries; and had delivered another 39 contracts the next day, while he and his brokerage accounted for 103 (or over 24%) of the 425 contracts delivered the second day. Tr. 1463:19-1465:3.

reliance upon inferences drawn from some of Dittmer's trades, for the judgment of the jury that his admissions of intent were to be believed and that, in light of what was an overall highly profitable strategy, his trades did not prove otherwise. Respondents would only wrap the appellate court's action in the cloak of finding insufficient evidence. While the evidence may have been insufficient in the minds of the appellate judges, it was not insufficient as a matter of law.[6]

Significantly, Respondents do not argue that the Court should not rectify a seventh amendment violation in the circumstances of this case. See Petition, at 15-17, 19-21. Rather, as pointed out above, they would merely recast the actions of the appellate court as a determination of the sufficiency of evidence, even though the substance of the ruling was nothing more than a re-weighing of the evidence.

---

6. The fact (Resp. Br. at 5-6) that the Eighth Circuit previously was met with claims by Refco's brokers and customers has nothing to do with the very different claims asserted by the plaintiffs in this case. The evidence below was significantly different -- and greater -- than what was before the appellate court in other suits. *Utesch v. Dittmer*, 947 F.2d 321, 324 (8th Cir. 1991). Likewise, it is of no moment that the Eighth Circuit has not ruled on Respondents' numerous other claims of error. *Id.* at 4. After a reversal by the Court, the Eighth Circuit may then address those other challenges. They are not at issue here, and plaintiffs are confident that they will prevail on every one of them.

2. The Decision Below Improperly Restricts Recovery under the Commodity Exchange Act.

The Respondents' argument on this point ignores basic common sense. The issue of causation of damages from an artificially high futures price cannot be so severely compartmentalized. When the futures price is brought to an artificially high level,[7] harm is naturally, forseeably, and directly caused when the pendulum then swings in the reverse direction, resulting in an artificially depressed cash price. *See* Petition at 25. Respondents ignore this issue although it is discussed at length in the Petition. *Id.*

Respondents also do not challenge plaintiffs' statement that the Eighth Circuit decision "is at odds with the Court's reasoning in *Curran*." Petition at 22. Moreover, Respondents are clearly in error when they state that the Second Circuit in *Leist v. Simplot*, 638 F.2d 283 (2d Cir. 1980), *aff'd sub nom. Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353 (1982), "dealt only with the existence of an implied private cause of action under Section 9(b) of the Commodities [sic] Exchange Act." Resp. Br. at 8. Unlike the Court's review on certiorari, which is limited to the question accepted for review, the Second Circuit decision determined that the dismissal of the claims under the Commodity Exchange Act as alleged there was error. On appeal, the defendants were entitled to assert any ground for affirmance, especially the failure of the complaints to state a claim upon which relief can be granted. *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970).

---

7. On this point, there is ample evidence, some of which is outlined in the Petition at 13, 23-24. The court below did not rule otherwise.

The issue is an important one beyond the scope merely of the Commodity Exchange Act and should be reviewed by the Court. Petition at 25.

3. Conspiracy of a Corporation with its President who is Pursuing his Private Interests is an Important Issue the Court should Review.

Once again, the Respondents fail to address the core issue presented by the Petition. While they recite the obvious statements from the Eighth Circuit opinion,[8] Respondents studiously avoid saying that, based on the record evidence, the jury could not have found that Dittmer, for his personal gain, conspired with Refco by causing it to act in a fashion Respondents concede was not in furtherance of its own interests.[9] In this regard, the decision below does

---

8. In stating that "[m]uch of the alleged conspiratorial conduct has not been shown to be anything more than normal legitimate trading activity," *Utesch*, 947 F.2d at 331, quoted in Resp. Br. at 9, the court failed to state, as it was required to conclude to uphold its determination, that with only insignificant exceptions, *all* of the evidence was of legitimate activity. Moreover, irrespective of whether trading otherwise could be legitimate if pursued unilaterally, United States v. Colgate & Co., 250 U.S. 300 (1919), the issue was whether there was evidence that Dittmer caused Refco to conspire with him.

9. Respondents attempt to perpetuate the myth that, because Refco did not trade for its own account, it "could not force a market up or down." Resp. Br. at 10. Clearly, the jury and the district court concluded that Refco could so act. In any event, Respondents concede that, in causing others to go long and then later to make deliveries, Refco was not pursuing its own

(continued...)

indeed conflict with the holdings of other appellate decisions. By failing expressly to address this major contention by plaintiffs, the court below also departed from the essence of its office, justifying the grant of the writ.

CONCLUSION

For all the foregoing reasons and those set forth in the Petition, Respondents have failed to present sufficient reasons for denial of the writ. Rather, as set forth in the Petition, it should be granted to permit the Court to review the important questions presented.

Respectfully submitted,

David H. Weinstein
Robert S. Kitchenoff
KOHN, NAST & GRAF, P.C.
1101 Market Street
Suite 2400
Philadelphia, PA 19107
(215) 238-1700

Of Counsel:
Robert B. Scism, Esq.
Des Moines, IA

Attorneys for Petitioners

Dated: April 20, 1992

9.(...continued)
interests. The jury rightly concluded that Refco was acting to benefit the private interests of Dittmer.

CERTIFICATE OF SERVICE

I hereby certify that I did this date cause three true copies of the foregoing Petitioners' Reply Brief in Support of Petition to be served upon the following attorney for respondents by United States first class mail, postage prepaid:

Elizabeth J. Robben, Esq.
Friday Eldredge & Clark
First Commercial Bldg., 20th Flr.
Little Rock, Arkansas 72201

Dated: April 20, 1992

/s/ David H. Weinstein
DAVID H. WEINSTEIN